

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
M2Z NETWORKS, INC.	)	
	)	
Application for License and Authority to	)	WT Docket No. 07-16
Provide National Broadband Radio Service	)	
In the 2155-2175 MHz Band	)	
	)	
Petition for Forbearance Under	)	WT Docket No. 07-30
47 U.S.C. § 160(c) Concerning Application of	)	
Sections 1.945(b) and (c)	)	
Of the Commission's Rules and Other	)	
Regulatory and Statutory Provisions	)	

To: Chief, Wireless Telecommunications Bureau

**M2Z NETWORKS, INC. *EX PARTE* RESPONSE  
TO REPLIES AND OPPOSITIONS**

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## **EXECUTIVE SUMMARY**

The replies to M2Z's Consolidated Opposition filed on March 26, 2007, as well as pleadings styled as oppositions to M2Z's Motion to Dismiss, Motion to Strike, and Petition for Forbearance (collectively, the "Replies"), all suffer from the same substantive defects that afflicted the original Petitions to Deny M2Z's Application and the alternative proposals for use of the 2155-2175 MHz band. All of these submissions, filed by a small but powerful group of incumbent operators, their trade associations, or spectrum speculators (collectively, the "Opponents"), fail to refute or address M2Z's detailed public interest demonstrations and technical showings in the Application, the Petition for Forbearance, the Consolidated Opposition, and other M2Z submissions in these dockets. The Replies continue this pattern of refusing to engage the ideas, explanations, and legal theories put forward by M2Z throughout this proceeding.

As such, the Replies are entirely unresponsive to M2Z's Consolidated Opposition and Motions, and contain nothing more than mere repetition of unsuccessful and unpersuasive arguments. Furthermore, the Replies cannot begin to counter the comments filed in support of the Application, as a broad range of consumers, consumer groups, business associations, advocacy organizations, lawmakers, and regulators have urged the Commission to consider the obvious public interest and consumer welfare benefits of M2Z's proposed service. The time for action has arrived. Delaying grant of the Application will serve only to deny consumers needed broadband competition and the benefits of a free nationwide broadband platform. For all of the reasons outlined in M2Z's prior submissions, the Commission should move promptly to grant the Application and Petition for Forbearance.

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To: Chief, Wireless Telecommunications Bureau

**M2Z NETWORKS, INC. *EX PARTE* RESPONSE  
TO REPLIES AND OPPOSITIONS**

M2Z Networks, Inc. ("M2Z"), by counsel, and pursuant to Section 1.1206(b) of the Commission's rules and the procedures set forth in the Commission's Public Notices<sup>1</sup> seeking comment on M2Z's Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band (the "Application")<sup>2</sup> and on the Petition of M2Z Networks,

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<sup>1</sup> See *Wireless Telecommunications Bureau Announces that M2Z Networks, Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing*, Public Notice, WT Docket No. 07-16, DA 07-492 (Wireless Telecom. Bur. rel. Jan. 31, 2007) (the "Public Notice"); *Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its Application for a License to Provide Radio Service in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-30, DA 07-736, (Wireless Telecom. Bur. rel. Feb. 16, 2007) (the "Forbearance Public Notice"). These proceedings have been designated as "permit-but-disclose" for *ex parte* purposes, and M2Z submits this response in accordance with the Commission's written *ex parte* rules. See *id.*; see also 47 C.F.R. § 1.1206(b). This *ex parte* submission responds to the new arguments and inaccuracies presented in the replies, oppositions and other submissions of the Opponents.

<sup>2</sup> See M2Z Networks, Inc., Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16, at 2–3 (filed May 5, 2006, and amended Sept. 1, 2006).

Inc. for Forbearance (the “Petition for Forbearance”),<sup>3</sup> hereby submits this ex parte response to the replies, oppositions, and other submissions filed by various parties in the above-captioned dockets.

## INTRODUCTION AND SUMMARY

The replies to M2Z’s Consolidated Opposition filed on March 26, 2007,<sup>4</sup> as well as pleadings styled as oppositions to M2Z’s Motion to Dismiss,<sup>5</sup> Motion to Strike,<sup>6</sup> and Petition for Forbearance (collectively, the “Replies”), all suffer from the same substantive defects that afflicted the original Petitions to Deny M2Z’s Application<sup>7</sup> and the alternative proposals for use of the 2155-2175 MHz band<sup>8</sup> submitted during the course of the past two months. All of these

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<sup>3</sup> See Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(a) and (c) of the Commission’s Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-30, at 2 (filed Sept. 1, 2006) (the “Petition for Forbearance”).

<sup>4</sup> See Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny, WT Docket Nos. 07-16 and 07-30 (filed Mar. 26, 2007) (the “Consolidated Opposition”).

<sup>5</sup> See Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals, WT Docket Nos. 07-16 and 07-30 (filed Mar. 26, 2007) (the “Motion to Dismiss”).

<sup>6</sup> See Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals, WT Docket Nos. 07-16 and 07-30 (filed Mar. 26, 2007) (the “Motion to Strike,” and, together with the Motion to Dismiss, the “Motions”).

<sup>7</sup> See AT&T Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“AT&T Petition to Deny”); CTIA – The Wireless Association, Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007); Petition to Deny of Motorola, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007); NextWave Broadband Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007); Petition to Deny of T-Mobile USA, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007); Petition to Deny of Verizon Wireless, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“Verizon Wireless Petition to Deny”); Wireless Communications Association International, Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007); Comments of the Consumer Electronics Association, WT Docket No. 07-16 (submitted Mar. 2, 2007); Comments of Leap Wireless International, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007); Opposition of EchoStar Satellite L.L.C., WT Docket No. 07-16 (submitted Mar. 2, 2007); Consolidated Petition to Deny and Comments of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 15, 2007); Consolidated Petition to Deny and Comments of the Rural Broadband Group, WT Docket No. 07-16 (submitted Mar. 16, 2007) (“Rural Broadband Group Petition to Deny”); Comments of the Information Technology Industry Council, WT Docket No. 07-16 (submitted Mar. 16, 2007).

<sup>8</sup> See Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007); Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007); Application of Commnet Wireless, LLC for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007); Application of NetfreeUS, LLC for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007); Application of McElroy Electronics Corporation for a Nationwide

submissions that oppose the Application and Petition for Forbearance, filed by a small but powerful group of incumbent operators, their trade associations, or spectrum speculators (collectively, the “Opponents”), fail to refute or address M2Z’s detailed public interest demonstrations and technical showings in the Application, the Petition for Forbearance, the Consolidated Opposition, and other M2Z submissions in these dockets. The Replies continue this pattern of the Opponents refusing to engage the ideas, explanations, and legal theories put forward by M2Z throughout the history of this proceeding.

As such, the Replies are entirely unresponsive to M2Z’s Consolidated Opposition and Motions, and contain nothing more than mere repetition<sup>9</sup> of the unsuccessful and unpersuasive arguments raised in the Opponents’ Petitions to Deny and the alternative proposals.

Furthermore, the Replies pale in comparison –in terms of sheer numbers and the weight of the various arguments – to the supportive comments filed by parties favoring grant of the Application, as a broad range of consumers, consumer groups, business associations, advocacy organizations, lawmakers, and regulators have urged the Commission to consider the obvious public interest and consumer welfare benefits of M2Z’s Application and proposed service.<sup>10</sup> For

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2155-2175 MHz Band Authorization, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“McElroy Proposal”); Proposal of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 16, 2007).

<sup>9</sup> Verizon Wireless, rather truthfully if somewhat ironically, notes that all of the parties filing Petitions to Deny against M2Z’s Application “echoed uniformly” the same points, which, as M2Z has shown, did little more than misstate M2Z’s positions and mischaracterize the law. *See* Reply of Verizon Wireless, WT Docket No. 07-16, at 1 (submitted Apr. 3, 2007) (“Verizon Wireless Reply”). Whatever incumbent wireless carriers and spectrum speculators may repeat to themselves in their echo chamber, the Petitions to Deny and subsequent Replies did not even address, let alone answer or effectively counter, most of the points made by M2Z in the Application and the Consolidated Opposition.

<sup>10</sup> *See* Consolidated Opposition at 3–5 & nn. 7–14 (describing supportive comments extolling the business, public interest, competitive, and consumer welfare benefits of M2Z’s proposed National Broadband Radio Service (“NBRBS”), a free nationwide broadband service likely to spur business development, enhance educational opportunities, promote public safety, and protect children from objectionable material, all while increasing spectral efficiency and diversity in the management and ownership of communications outlets).

all of the reasons outlined in M2Z's prior submissions and reiterated herein, the Commission should move promptly to grant the Application and Petition for Forbearance.

**I. THE PROCEDURAL FLAWS IN THE PETITIONS TO DENY WERE SIGNIFICANT AND WARRANT DISMISSAL**

In its Motion to Strike, M2Z demonstrated that nearly all of the Petitions to Deny filed by the Opponents were procedurally defective and subject to dismissal with prejudice on the basis of statutory violations. In the main, several of the Opponents failed to fulfill their obligations under Section 309(d)(1) of the Act to serve M2Z with a copy of their petitions to deny and failed to support those petitions with affidavits.<sup>11</sup> Several of the Replies offer unpersuasive excuses for various Opponents' failures to comply with the Act, suggesting that such missteps were of minimal importance, that the requirements spelled out in the Act do not apply in this instance, or that the Commission should overlook or forgive these defects.<sup>12</sup> The requirements with which the Opponents failed to comply, however, are statutory obligations contained in Section 309(d)(1) of the Act, which the Commission cannot waive. Moreover, it is not the case that M2Z "could not have been harmed by failures to serve" or include affidavits with the Petitions to Deny.<sup>13</sup> Procedural infirmities such as those displayed by several of the Petitions to Deny compromise M2Z's ability to protect its rights in the proceeding and suggest a disturbing belief on the part of some Opponents that they can abuse the regulatory process without sanction.<sup>14</sup> The Motion to Strike and the Motion to Dismiss provided ample reason to dismiss the Petitions to Deny and the alternative proposals, illustrating yet another reason why the Commission should

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<sup>11</sup> See Motion to Strike at 8–10, 15; see also *id.* at Exhibit C (charting procedural defects in various Opponents' Petitions to Deny).

<sup>12</sup> See, e.g., CTIA Reply at 20–22; T-Mobile Reply at 7–8; Verizon Wireless Reply at 1 n.1; Commnet Wireless, LLC, Opposition to Motion to Dismiss and Motion to Strike, WT Docket No. 07-16, at 5 (submitted Apr. 10, 2007).

<sup>13</sup> See CTIA Reply at 21.

<sup>14</sup> See *id.* at 21–22 (assuring the Commission after the fact that there was no intent to abuse Commission processes).

grant M2Z's Application and give no weight to Opponents' protests. M2Z also contends that each of the petitions to deny failed to make a *prima facie* case against M2Z's application as required by law.<sup>15</sup> In this regard, M2Z agrees with CTIA's assertion that "M2Z's suggestion that such arguments fail to make a *prima facie* case is simply correct."<sup>16</sup>

## **II. SECTION 309(j)(6)(E) OF THE COMMUNICATIONS ACT REQUIRES GRANT OF M2Z'S APPLICATION DUE TO THE PUBLIC INTEREST BENEFITS THAT WOULD RESULT FROM AVOIDING MUTUAL EXCLUSIVITY IN THIS INSTANCE**

### **A. The Replies Do Not Refute M2Z's Showing that Grant of M2Z's License Application is in the Public Interest.**

The Petitions to Deny and the Replies fail to refute M2Z's substantial public interest showing and M2Z's analysis of the Commission's discretion and authority under Section 309(j) of the Communications (the "Act"). On its face, the Application provides sufficient information and detail regarding the public interest benefits of M2Z's proposal for the Commission to exercise its discretion under Section 309(j)(6)(E) to authorize the NBRS and grant M2Z's requested license.<sup>17</sup> The Motion to Dismiss and the Consolidated Opposition reiterated the public interest benefits of M2Z's service first proposed in the Application.<sup>18</sup> These M2Z submissions also provided more detail on the public interest and consumer welfare benefits of M2Z's proposed service, as forecast in three economic analyses that estimated the expected value of the consumer welfare benefits, public safety and USF savings, and voluntary spectrum usage fee payments promised by M2Z's service.<sup>19</sup>

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<sup>15</sup> See Motion to Strike at 13-16.

<sup>16</sup> CTIA Reply at 22.

<sup>17</sup> See, e.g., Application at 2-6, 22-33, and Appendices 2-5.

<sup>18</sup> See, e.g., Motion to Dismiss at 6-8, 14-43; Consolidated Opposition at 8-11, 13-23.

<sup>19</sup> See, e.g., Motion to Dismiss at 35-38; Consolidated Opposition at 15-23. Both of these M2Z submissions cited economic research papers also filed in these dockets, including Simon Wilkie, "The Consumer Welfare Impact of M2Z Networks Inc.'s Wireless Broadband Proposal," WT Docket No. 07-16 (submitted Mar. 2, 2007) (Wilkie,

The Replies refuse to address this hard evidence demonstrating the likely public interest benefits of the NBRS. Instead, the Opponents – understandably, but regrettably – take a pass on confronting the solid evidence by simply pretending that the economic analyses submitted in these proceedings do not exist. Only AT&T even bothers to mention the Wilkie and Liopiros studies, and the best “attack” that AT&T can mount against these careful economic analyses is to note that the papers were prepared on M2Z’s behalf and that they “purport to show the benefits of expanded broadband availability and enhanced competition, as well as incidental public safety benefits and savings with respect to universal service.”<sup>20</sup> The fact that the studies were prepared on M2Z’s behalf is no revelation, as the submissions by Drs. Wilkie and Liopiros are entirely forthcoming on this point. More to the point, AT&T and the other Opponents have not even attempted to address the substance of these studies despite having ample time and opportunity to do so.

Because the Opponents have not, and cannot, refute M2Z’s factual showings with anything approaching a reasoned analysis, they opt instead to label the public interest benefits of M2Z’s proposal as “illusory”<sup>21</sup> and “alleged”<sup>22</sup> gains constituting nothing more than a “unilateral

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“Consumer Welfare Impact”); and Kostas Liopiros, “The Value of Public Interest Commitments and the Cost of Delay to American Consumers,” WT Docket No. 07-16 (submitted Mar. 19, 2007) (“Liopiros”).

<sup>20</sup> AT&T, Inc., Consolidated Reply to Opposition to Petitions to Deny and Reply Comments Regarding Forbearance Petition, WT Docket Nos. 07-16 and 07-30, at 4–5, 14–15 (submitted Apr. 3, 2007) (“AT&T Reply”).

<sup>21</sup> See Reply of CTIA – The Wireless Association, WT Docket Nos. 07-16 and 07-30, at 3, 5, 15 (submitted Apr. 3, 2007) (“CTIA Reply”); see also MetroPCS Communications, Inc.’s Reply to M2Z Networks, Inc.’s Opposition to Petitions to Deny and Petition for Forbearance, WT Docket Nos. 07-16 and 07-30, at 8 (submitted Apr. 3, 2007) (“MetroPCS Reply”). M2Z notes that the MetroPCS “reply” is nothing more than a late-filed petition to deny, no matter how it is styled, and therefore should be dismissed as untimely pursuant the March 16 filing deadline for such petitions established in the Commission’s March Public Notice. See *Wireless Telecommunications Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-16, DA 07-987 (Wireless Telecom. Bur. rel. Mar. 9, 2007) (the “March Public Notice”). The MetroPCS pleading states that “MetroPCS opposes a grant of the M2Z Application” and indicates that “MetroPCS is [also] filing this *opposition pleading* in the forbearance proceeding.” See MetroPCS Reply at 1; *id.* at 2 n.4 (emphasis added).

<sup>22</sup> See CTIA Reply at 15; Verizon Wireless Reply at 2; NextWave Broadband Inc., Reply to Consolidated Opposition of M2Z Networks, Inc., WT Docket No. 07-16, at 8 (submitted Apr. 3, 2007) (“NextWave Reply”).

assumption.”<sup>23</sup> Contrary to these assertions, the expected public interest benefits documented in the record are anything but a unilateral declaration, as a host of commenters have cited and reaffirmed the potential public interest benefits that grant of the Application would produce.<sup>24</sup> Moreover, notwithstanding the repeated self-serving statements of the Opponents regarding the “illusory” nature of these benefits, the dockets established for this proceeding are filled with unrefuted economic analyses and documentation of the concrete public interest benefits that would flow from M2Z’s proposed service. The Opponents attempt to ignore the evidence in these studies, but ignoring the voluminous record supporting grant of the Application does nothing to counter M2Z’s public interest showing. Contrary to AT&T’s assertion, M2Z does not ask the Commission to “turn a blind eye”<sup>25</sup> to the supposed public interest concerns raised by the Opponents. M2Z instead asks the Commission to consider the public interest benefits of the NBRS, and grant the Application.

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<sup>23</sup> See Reply of T-Mobile USA, Inc. to Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny and Opposition to Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals, WT Docket Nos. 07-16 and 07-30, at 3 (submitted Apr. 3, 2007) (“T-Mobile Reply”).

<sup>24</sup> See, e.g., Comments of the California Association for Local Economic Development, WT Docket No. 07-16, at 2–3 (submitted Feb. 14, 2007) (noting that widespread governmental interest in deploying broadband stems from recognition that broadband access fosters economic development and that M2Z’s innovative proposal will help government expand broadband access using private funds); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket No. 07-16, at 10–11 (submitted Mar. 2, 2007) (noting that the Internet is crucial to the success of all small and independent businesses, which account for over 99% of all companies, and asserting that “a free, nationwide broadband Internet access service would extend the potential of e-commerce to all businesses” and that readily available broadband access is essential for small and independent businesses to remain successful in an increasingly electronic world); Comments of The Electronic Retailing Association, WT Docket Nos. 07-16 and 07-30, at 1–2 (submitted Feb. 26, 2007) (“ERA Comments”) (noting that connection to the Internet makes available to online entrepreneurs the ability to market directly to the end-consumer in an affordable and direct way through e-mail, websites and advertising); Comments of The Center for Digital Future, WT Docket No. 07-16, at 2 (submitted Feb. 27, 2007) (explaining the importance of market competition by highlighting the price drop for DSL service and an associated increase in broadband adoption); Comments of FiberTower Corporation, WT Docket 07-16, at 2 (submitted Mar. 2, 2007) (“Consumers win because they ultimately enjoy all the benefits of enhanced competition including greater choice and lower prices.”); ERA Comments at 2 (submitted Feb. 6, 2007) (noting that only 35% of small businesses currently have websites and only 57% use the Internet for business related activities, which “further exemplifies the need for affordable, reliable solutions to the significant, and often times, insurmountable, cost of broadband connectivity”); Comments of The Latino Coalition, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 22, 2007) (explaining that most Americans only have two choices for broadband: cable and DSL, which are still cost prohibitive to many Americans).

<sup>25</sup> AT&T Reply at 20.

**B. M2Z’s Analysis in the Consolidated Opposition and Other Pleadings Showed That it is in the Public Interest to Avoid Mutual Exclusivity in This Instance and Grant the Application Pursuant to Section 309(j)(6)(E).**

The Opponents also persist in their attempt to foist on the Commission a fundamentally flawed understanding of Section 309(j) of the Act. In the Consolidated Opposition, M2Z explained that the Petitions to Deny had mischaracterized the nature and extent of the Commission’s authority and discretion under Section 309(j) and virtually ignored the Commission’s public interest obligation under Section 309(j)(6)(E) “to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.”<sup>26</sup> The meaning of Section 309(j) is clear on its face. The plain language of Section 309(j)(1) authorizes the Commission to use competitive bidding only “[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are *accepted*.”<sup>27</sup> The Commission therefore has an affirmative duty to avoid mutual exclusivity pursuant to Section 309(j)(6)(E) when doing so would serve the public interest. As Section 309(j)(6)(E) itself makes clear, the Commission’s competitive bidding authority must not “be construed to relieve the Commission of the *obligation* in the public interest . . . to avoid mutual exclusivity” in such instances.<sup>28</sup>

As the Consolidated Opposition also explained,<sup>29</sup> the Commission’s *1997 Balanced Budget Act Order* set forth the Commission’s authority and obligations under Section 309(j)(1), noting that “notwithstanding the Commission’s expanded auction authority, its determinations regarding mutual exclusivity must still be consistent with *and not minimize its obligations* under

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<sup>26</sup> 47 U.S.C. § 309(j)(6)(E). *See generally* Consolidated Opposition at 31–47 (discussing the plain text, legislative history, and Commission and court precedent regarding Section 309(j) in general and Section 309(j)(6)(E) in particular).

<sup>27</sup> 47 U.S.C. § 309(j)(1) (emphasis added).

<sup>28</sup> 47 U.S.C. § 309(j)(6)(E) (emphasis added).

<sup>29</sup> *See* Consolidated Opposition at 38.

Section 309(j)(6)(E).”<sup>30</sup> The *1997 Balanced Budget Act Order* linked the public interest test under Section 309(j)(6)(E) to the guidelines that inform the Commission’s design of competitive bidding processes according to the mandates of Section 309(j)(3).<sup>31</sup> Noting that its obligations under Section 309(j)(6)(E) had been in existence as long as the Commission’s auction authority itself, the Commission explained that it “has consistently interpreted this provision to mean that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed therein only when doing so would further the public interest goals of Section 309(j)(3).”<sup>32</sup>

Consistent with this controlling Commission precedent, M2Z’s Consolidated Opposition discussed the service proposed in the Application in terms of the four substantive public interest considerations delineated in Section 309(j)(3), showing that the Application meets or exceeds these standards that the Commission uses when determining whether to avoid mutual exclusivity in spectrum licensing.<sup>33</sup> M2Z demonstrated that grant of the Application would (a) promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays”; (b) promote “economic opportunity and competition and ensur[e] that new and innovative

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<sup>30</sup> *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22709, ¶ 14 (2000) (emphasis added) (“*1997 Balanced Budget Act Order*”).

<sup>31</sup> See *id.*, ¶ 21.

<sup>32</sup> *Id.* As M2Z acknowledged, the Commission has explained that the use of competitive bidding processes is not disfavored or subordinate to Section 309(j)(6)(E), and that “avoidance of mutual exclusivity [is not] the paramount goal of the statute.” *Id.*, ¶¶ 22–23. Nevertheless, as Congress and the Commission itself have recognized, Section 309(j)(6)(E) also cannot be minimized or read out of the statute in the manner that Opponents attempt. The Consolidated Opposition cited and quoted the Conference Report accompanying the 1997 amendments to Section 309(j), which emphasized that “notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission[']s obligations under section 309(j)(6)(E).” H.R. Conf. Rep. No. 105-217, at 572 (1997). As that Conference Report explained, “[t]he conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.” *Id.*

<sup>33</sup> See Consolidated Opposition at 39–47.

technologies are readily accessible to the American people”; (c) recover for the public a portion of the value of the public spectrum resource made available for commercial use; and (d) ensure efficient and intensive use of the electromagnetic spectrum.<sup>34</sup> M2Z’s analysis thus showed that it is in the public interest, under Section 309(j)(6)(E) and Section 309(j)(3), to avoid mutual exclusivity in this instance and grant the Application. The M2Z Motions also demonstrated that the Commission should exercise its discretion and follow its mandate under Section 309(j)(6)(E) to not accept for filing any of the alternative proposals submitted in response to the Public Notice, with M2Z showing that these copy-cat proposals were, first, procedurally and substantively defective,<sup>35</sup> and in any event substantively inferior in a wide array of respects to the M2Z proposal outlined in the Application.<sup>36</sup>

The Replies do little more than warm over and repeat the flawed interpretations of the provisions of Section 309(j) that the Opponents initially offered in their Petitions to Deny. For example, CTIA suggests that M2Z attempts to “bypass” Section 309(j)(1), but CTIA itself ignores the prominent place of Section 309(j)(6)(E) in Section 309(j)(1) and characterizes the language in paragraph (6)(E) as a mere reminder to the Commission.<sup>37</sup> CTIA fails the laugh test by suggesting that statutory language describing the Commission’s “*obligation* in the public interest . . . to avoid mutual exclusivity in application and licensing proceedings,” *see* 47 U.S.C. § 309(j)(6)(E) (emphasis added), is just a helpful reminder rather than a clear mandate in the Communications Act.

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<sup>34</sup> *See id.* at 39–40 n.124 (quoting 47 U.S.C. § 309(j)(3)).

<sup>35</sup> *See* Motion to Dismiss at 39–42; Motion to Strike at 5–6.

<sup>36</sup> *See* Motion to Dismiss at vii; *see also id.* at 14–48 (detailing the shortcomings of the alternative proposals with respect to their unwillingness and inability to provide the public interest benefits promised by M2Z, including ubiquitous and free broadband service on a definitive timetable, universal service savings and public safety benefits, family friendly service, spectrum usage fees, and overall competitive and economic stimulus).

<sup>37</sup> *See* CTIA Reply at 5–6.

Other Opponents fare no better with their flawed interpretations of Section 309(j)(6)(E) and their mischaracterizations of the Commission’s general competitive bidding authority. Verizon Wireless continues attacking the straw man of Section 309(j)(2), explaining yet again that M2Z’s Application does not fall within the exceptions to competitive bidding authority delineated in that section, despite the fact that M2Z has never made any claim to such exceptions.<sup>38</sup> The Verizon Wireless reply briefly mentions Section 309(j)(6)(E), but does so only after claiming that six competing applications for the 2155-2175 MHz band have been filed.<sup>39</sup> Verizon Wireless fails to note that the Commission has not actually accepted any of these alternative proposals for filing, meaning that the Commission’s obligation under Section 309(j)(1) to use competitive bidding mechanisms *after* “mutually exclusive applications are *accepted*” cannot attach here.<sup>40</sup> Verizon Wireless also fails to note that one of the alternative proposals, filed by McElroy Electronics Corporation, has already been rejected as defective.<sup>41</sup> In the end, Verizon Wireless proffers the almost inexplicable argument that “M2Z is not asking the Commission [under Section 309(j)(6)(E)] to adopt reasonable service rules or appropriate threshold qualifications to ensure the license is awarded to the entity best able to serve the public interest”<sup>42</sup> when, in fact, M2Z has asked the Commission to adopt the detailed service commitments proposed in the Application after judging the threshold qualifications and public interest benefits of M2Z’s proposal and granting the requested license.

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<sup>38</sup> See Verizon Wireless Reply at 2 n.3.

<sup>39</sup> 47 U.S.C. § 309(j)(1) (emphasis added).

<sup>40</sup> See Verizon Wireless Reply at 2–3.

<sup>41</sup> See Letter of Financial Operations Office to Lukas, Nace, Gutierrez & Sachs (Mar. 6, 2007), *cited in* McElroy Electronics Corporation, Petition for Reconsideration, WT Docket No. 07-16, at 1 (submitted Apr. 2, 2007).

<sup>42</sup> Verizon Wireless Reply at 3.

T-Mobile also cannot resist repeating its Section 309(j)(2) argument despite the fact that M2Z has acknowledged repeatedly that grant of its Application does not depend on any of the exemptions in that statute.<sup>43</sup> T-Mobile then advances a fanciful and nonsensical reading of Section 309(j)(6)(E), arguing that this “statutory section by its very terms only addresses applications that already have been accepted for filing,”<sup>44</sup> despite the fact that Section 309(j)(1) plainly gives the Commission discretion regarding the acceptance of mutually exclusive applications. Compounding the error, T-Mobile insists that the engineering solutions, threshold qualifications, service regulations, and other methods listed in Section 309(j)(6)(E) merely assist the Commission in determining “whether mutual exclusivity exists among competing applications,” in which case the Commission “must auction the spectrum.”<sup>45</sup> Under its ridiculous statutory interpretation, T-Mobile does not and could not possibly explain what the “very terms” of Section 309(j)(6)(E) might mean when they direct the Commission to *avoid* mutual exclusivity in application and licensing proceedings such as the instant proceeding. T-Mobile also does not and could not explain the meaning, under its preferred reading of the Act, behind Section 309(j)(1)’s command to use competitive bidding mechanisms only *if* mutually exclusive applications are *accepted* for filing by the Commission.

NextWave makes essentially the same errors as Verizon Wireless and T-Mobile, contending that the Commission’s use of Section 309(j)(6)(E) to grant the Application would make Section 309(j)(1) meaningless.<sup>46</sup> Of course, it is the Opponents that look to render a statute meaningless by failing to consider the impact of Section 309(j)(6)(E) on the competitive bidding

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<sup>43</sup> See T-Mobile Reply at 2 n.4 (citing M2Z’s Consolidated Opposition at 34–35).

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.*

<sup>46</sup> See NextWave Reply at 3. NextWave actually cites “the Section 309(j)(3) mandate to award mutually exclusive license applications by auction,” but M2Z assumes that NextWave intended to refer instead to Section 309(j)(1) because there is no such directive in Section 309(j)(3).

provisions throughout Section 309(j). NextWave misses the mark by failing to understand that whatever mandate Section 309(j)(1) may contain, the obligation to use competitive bidding mechanisms applies only “[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit.”<sup>47</sup> As M2Z explained in its Consolidated Opposition, Section 309(j)(6)(E) allows the Commission to do precisely what NextWave and other Opponents claim the Commission cannot do in making initial license decisions based on public interest considerations.<sup>48</sup>

Within the Replies, there is at least an acknowledgment by some of the Opponents that Section 309(j)(6)(E) grants the Commission the discretion that M2Z has described in its Application and other pleadings in this docket. AT&T, for example, while incorrectly suggesting that competing applications have been accepted for filing in the instant proceeding, grudgingly concedes that “grant of M2Z’s proposal” is possible under Section 309(j)(6)(E) if “the FCC makes a well-grounded public interest finding” regarding the Applications and refuses to accept inferior alternative proposals for filing here.<sup>49</sup> AT&T notes that the Commission can “determine whether any one proposal represents the highest public use of the spectrum and whether there are substantial public interest reasons to avoid mutually exclusivity (*e.g.*, because one broadband proposal is far superior to another).”<sup>50</sup> As explained below, there is no need to

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<sup>47</sup> 47 U.S.C. § 309(j)(1).

<sup>48</sup> See Consolidated Opposition at 46–47. Other similar Commission decisions to grant spectrum rights without auction also involved the modification of existing licenses, as the Replies note. See, *e.g.*, CTIA Reply at 7 (citing the Mobile Satellite Service (“MSS”) order handed down in *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, Report and Order, 13 FCC Rcd 9111, ¶ 122 (1997)); Verizon Wireless Reply at 3–4 n.9. The fact that the Commission’s decision in the MSS proceeding involved the modification of existing authorizations rather than the grant of initial licenses does not change the fact that the Commission has the discretion, authority, and obligation to avoid mutual exclusivity in the public interest in all application and licensing contexts, including the grant of initial spectrum licenses such as the license requested in M2Z’s Application.

<sup>49</sup> See AT&T Reply at 6–7.

<sup>50</sup> *Id.* at 9.

conduct a hearing in this proceeding to make such a determination, as M2Z has demonstrated in the Motion to Dismiss the many ways in which the alternative proposals are inferior to the NBRs proposed in M2Z's Application. Nevertheless, the key point in AT&T's reply is that the Commission *can* make a public interest determination to grant M2Z's Application under Section 309(j)(6)(E). Based on the showing in M2Z's prior pleadings, the unrefuted economic analyses submitted in these dockets, and the weight of the voluminous record in this proceeding, M2Z respectfully submits that the Commission must make such a determination and grant the Application.

**C. The Commission's Prior Decisions Confirm That All Spectrum Assignment Decisions, Including the Decision to Accept Mutually Exclusive Applications and Hold an Auction, Must Be Based on a Public Interest Finding.**

The Opponents' attempts to distinguish or discredit the authorities on which M2Z relies for the interpretation of Section 309(j)(6)(E) are unavailing. As M2Z noted in its Consolidated Opposition, the Commission clarified its authority under Section 309(j)(6)(E) in the *800 MHz Re-banding Order* by stating that "we could have exercised our authority to grant rights to the ten megahertz of spectrum to Nextel as an initial license, without subjecting the spectrum to competitive bidding procedures. The auction requirement of Section 309(j)(1) applies only when the Commission has accepted mutually exclusive applications for a new license."<sup>51</sup> M2Z has in its prior submissions in these dockets detailed the similarities between the facts in the *800 MHz Re-banding Order* and the present Application by detailing the similar public safety concerns at issue in both situations.<sup>52</sup> Yet, the lesson of the *800 MHz Re-banding Order* that the Opponents fail to recognize is just as obvious as the public safety and public interest benefits of M2Z's

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<sup>51</sup> *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, ¶¶ 74 (2004) ("*800 MHz Re-banding Order*").

<sup>52</sup> *See id.* at 43–44.

proposal that these incumbent wireless carriers refuse to acknowledge. In the *800 MHz Re-banding Order*, the Commission explained:

Section 309(j) supports our conclusion that we have authority to avoid mutual exclusivity in this context when it is in the public interest to do so. Although 309(j) requires auctions whenever mutually exclusive applications for initial license are filed, Section 309(j)(6)(E) provides that “[nothing in this subsection shall] be construed to relieve the Commission of the *obligation in the public interest* to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity *in application and licensing proceedings*.”<sup>53</sup>

Adding further to the clarity of that pronouncement, the Commission subsequently confirmed that “[S]ection 309(j)(6)(E) gives the Commission broad authority to create or avoid mutual exclusivity in licensing, based on the Commission’s assessment of the public interest.”<sup>54</sup> The Commission thus wasted little time in dispatching arguments made by CTIA and Verizon Wireless in the 800 MHz proceeding, where those parties suggested incorrectly that grant of an initial license must be subject to competitive bidding whenever other carriers voice their intent to participate in a future auction of the spectrum.<sup>55</sup> On a related point, MetroPCS’s disclosures in its recently filed S-1 belie its statement that it would participate in a 2155-2175 MHz band auction,<sup>56</sup> and other claims that incumbent carriers or parties filing alternative proposals might or could participate in such an auction are legally irrelevant if not factually suspect in all cases.

The Commission’s precedents in other situations also confirm its discretion and authority under Section 309(j)(6)(E). Even in situations in which the Commission has ultimately decided

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<sup>53</sup> *800 MHz Re-banding Order*, ¶ 73 (alterations and emphases in original).

<sup>54</sup> *Id.*, ¶ 85.

<sup>55</sup> *See id.*, ¶¶ 70–72.

<sup>56</sup> *See* MetroPCS Reply at 2. In its S-1, MetroPCS admitted its material financial weakness and financial viability issues, enforcement issues concerning its divestiture of spectrum, pending and threatened litigation regarding its core businesses, and prior failures to register with the Securities and Exchange Commission. *See* MetroPCS Communications, Inc. Form S-1 Registration Statement, filed April 3, 2007, *available at* <http://www.sec.gov/Archives/edgar/data/1283699/000095013407007439/d42547a4sv1za.htm#101>. These disclosures, and the fact that MetroPCS never mentioned in its S-1 that it might seek to acquire at auction 2155-2175 MHz spectrum, cast significant doubt on MetroPCS’s ability to participate in any such auction.

not to grant initial licenses without an auction, the Commission's discretion to assign the initial licenses without an auction has been clear. As CTIA suggests in its reply, the Commission's decision in the *Northpoint Order* stands only for the proposition that awarding licenses by auction was advisable in that case because "the filing of mutually exclusive applications was possible *and* was in the public interest."<sup>57</sup> CTIA thus concedes, as it must, that the Commission's determination to accept mutually exclusive applications in the first place, and thereby trigger the competitive bidding requirements of Section 309(j)(1), must itself be based on a finding that creating mutual exclusivity and conducting an auction would be in the public interest.

In opposing the Application, the Opponents make general and abstract statements about the benefit of competitive bidding as a license assignment tool.<sup>58</sup> The Replies, however, offer nothing to dispute or discredit M2Z's showing that in this particular instance the public interest would be best served by avoiding mutual exclusivity under Section 309(j)(6)(E) and granting M2Z's Application. It is particularly notable that none of the Opponents, neither the wireless incumbents nor the spectrum speculators that submitted alternative proposals for use of the 2155-2175 MHz band, has described the type of service offering that would be made possible by auctioning the spectrum, or explained how that service would compare, in terms of public interest and consumer welfare benefits, to M2Z's proposed service. Such an analysis is required in this case, however, because M2Z has requested that the Commission avoid mutual exclusivity

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<sup>57</sup> CTIA Reply at 6 (emphasis added) (citing *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶¶ 238–240 (2002) ("*Northpoint Order*"). As M2Z noted in its Consolidated Opposition, the filing of mutually exclusive applications would not be possible in the 2155-2175 MHz as it was in the *Northpoint* proceeding because grant of a nationwide license for M2Z's proposed NBRS would eliminate the need for consideration of geographic licensing area sizes.

<sup>58</sup> See, e.g., CTIA Reply at 3; Verizon Wireless Reply at 3; AT&T Reply at 7; T-Mobile Reply at 2; MetroPCS Reply at 13.

pursuant to the public interest prong of Section 309(j)(6)(E). Indeed, the Commission must make a specific finding on this issue in order to determine the spectrum assignment mechanism that would best promote the public interest. While Section 309(j)(6)(E) does not make the avoidance of mutual exclusivity the paramount goal of the Act, Section 309(j)(6)(E) nonetheless limits the Commission to conducting an auction only where it can specifically demonstrate that such an auction is in the public interest.<sup>59</sup> In view of the overwhelming record evidence indicating that the public interest would be best furthered by granting M2Z's Application without auction, the Commission must adhere to the requirements of Section 309(j)(6)(E) and grant the Application.

Finally, as demonstrated in the Consolidated Opposition and in a separate economic analysis filed in this proceeding, there is no reason to suspect that an auction of the 2155-2175 MHz spectrum would result in more rapid deployment of service than that provided for in the Application. In addition to the considerable and unnecessary delays associated with designing and implementing service rules and competitive bidding procedures, there is no guarantee that a winning bidder or bidders will be willing or able to construct a network or networks and deploy services after the auction. The Consolidated Opposition discussed in detail the spectrum warehousing incentives that exist for incumbent wireless and wireline broadband providers that would stand to benefit from acquiring spectrum simply in order to limit, delay, or prevent entry by new competitors.<sup>60</sup> The Consolidated Opposition points out that even after two, three, seven,

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<sup>59</sup> See *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000).

<sup>60</sup> See Consolidated Opposition at 48–53 (citing Simon Wilkie, PhD., “*Spectrum Auctions Are Not a Panacea: Theory And Evidence Of Anti-Competitive and Rentseeking Behavior in FCC Rulemakings and Auction Designs*,” WT Docket Nos. 07-16 & 07-30, at 13–19, 39 (filed Mar. 26, 2007)).

eight, and even nine years, a wide range of auctioned services have experienced no meaningful deployment because of spectrum warehousing in these bands.<sup>61</sup>

For these reasons, the Commission should reject spurious claims in the Replies such as T-Mobile's contention that M2Z "provides no data or even logic to support"<sup>62</sup> its conclusions about the very real possibility of spectrum warehousing should the Commission decide to auction the 2155-2175 MHz band. It is T-Mobile and the other Opponents that have failed to supply any data or logic supporting their claim that auctions would, in this instance and in this band, result in better service or greater public interest and consumer welfare benefits than those promised in the Application. Grant of the Application would facilitate the entry of M2Z, a new competitor in the broadband market with every intention and capability of deploying the NBRs on the aggressive schedule outlined in the Application.

### **III. SECTION 7 PROVIDES FURTHER SUPPORT FOR A COMMISSION GRANT OF M2Z'S APPLICATION BY MAY 5, 2007, AND OPPONENTS' CLAIMS THAT M2Z SEEKS PREFERENTIAL TREATMENT ARE UNFOUNDED AND HAVE BEEN REFUTED**

Contrary to the views expressed in some of the Replies,<sup>63</sup> M2Z's Application is, in fact, subject to the express terms of Section 7 of the Act, 47 U.S.C. § 157, including the presumption in favor of new technology and services set forth in Section 7(a) and the one-year deadline for Commission action set forth in Section 7(b). Section 7 provides that the Commission "shall determine whether any new technology or service proposed in a petition or application is in the

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<sup>61</sup> See *id.* at 50–53 (discussing failures to develop mature, consumer-based services in the WCS, LMDS, MVDDS, and EBS/BRS bands); see also *id.* at 48 n.151 (citing *Wireless Telecommunications Bureau Grants 36 VHF Public Coast and Location and Monitoring Service Licenses*, Report No. AUC-39, DA 07-1097 (Wireless Telecom. Bur. rel. Mar. 13, 2007), a public notice announcing the grant of licenses in mid-March 2007 to a bidder that won those licenses at auction in June 2001).

<sup>62</sup> T-Mobile Reply at 3 n.5.

<sup>63</sup> See CTIA Reply at 12–15; Verizon Wireless Reply at 4–5; AT&T Reply at 21–22; T-Mobile Reply at 4–5; NextWave Reply at 4 n.10.

public interest within one year after such petition or application is filed”<sup>64</sup> and places the burden on those who oppose a proposal for new technology or services to demonstrate that the proposal is inconsistent with the public interest.<sup>65</sup> Proper application of the presumption and one-year deadline to M2Z’s Application requires that the Commission grant the license requested by M2Z by May 5, 2007, one year after M2Z filed its Application.

Some of the Replies suggest that Section 7 does not apply to the Application because the NBRS, as proposed by M2Z, does not constitute a “new technology or service” under the statute.<sup>66</sup> As the Commission no doubt recognizes, however, this view is incorrect. The Commission has previously stated that “Section 7(b), by its terms, applies to ‘any new technology or service proposed in a petition or application,’ and requires [the] Commission to determine whether the technology or service is in the public interest within one year after the filing of a petition or application.”<sup>67</sup> It has also distinguished proposals for “new” technology and services, which are subject to Section 7, from proposals that merely “continue” or “exten[d]” the useful life of old technology.<sup>68</sup>

Under the Commission’s precedents, the NBRS, as proposed by M2Z, qualifies as a new service. First, M2Z has requested that the Commission use this proceeding to establish service

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<sup>64</sup> 47 U.S.C. § 157(b).

<sup>65</sup> See 47 U.S.C. § 157(a) (“Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.”).

<sup>66</sup> See Verizon Wireless Reply at 4 (“Numerous entities currently provide wireless broadband services, many at faster speeds than M2Z proposes.”); AT&T Reply Comments at 21 (“[T]he proposed M2Z service offers no new technical innovation or advancement of the art of telecommunications and does not offer to provide meaningful service to the places in the United States that need it most – truly unserved and rural areas.”) (quoting Rural Broadband Group Petition to Deny at 4); T-Mobile Reply at 5 (“M2Z’s proposed service offers nothing new in terms of technology or service compared to wireless broadband services already available throughout the country.”); NextWave Reply at 4, n.10 (“M2Z’s Application does not propose a new technology or service within the meaning of Section 7.”); CTIA Reply at 13-15 (characterizing M2Z’s technology and service as “outmoded”).

<sup>67</sup> *Southwestern Bell Telephone Company Revisions to Tariff*, Memorandum Opinion and Order, 6 FCC Rcd 3760, ¶ 30 (1991) (“*Southwestern Bell MO&O*”).

<sup>68</sup> *Id.*

rules for the 2155-2175 MHz band that do not currently exist. Second, the service rules and conditions that M2Z has proposed differ in many significant ways from the service rules and conditions currently applicable to other providers of broadband services. For example, key aspects of M2Z’s proposed offering (including the absence of a periodic subscription fee for the service, network-based content filtering, universal access to the network without a fee for every public safety agency operating within the United States and deployment of the network to 95 percent of the population of the United States within ten years of service commencement) have never been provided or proposed to be provided by an existing provider of broadband service. Third, under M2Z’s proposal the NBRS would be provided using innovative and spectrally efficient Time Division Duplex (“TDD”) technology, which allows two-way services to be provided over unpaired spectrum. This technology has not been deployed significantly in the United States. These aspects of M2Z’s proposed NBRS distinguish it from the broadband services currently being offered, establish that the NBRS does not merely continue or extend the useful life of old technologies and services, and make it “new” for purposes of Section 7. Although those existing providers with the most to lose from M2Z’s unprecedented offering may characterize the NBRS as not a new service, consumers will certainly recognize it as such, and so should the Commission.<sup>69</sup>

Some of the Replies, while accepting that M2Z’s NBRS proposal might qualify for consideration under Section 7, attempt to undercut the impact of Section 7 by asserting that it is “merely a general statement of policy”<sup>70</sup> or “merely a broad policy statement reflecting

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<sup>69</sup> Under the logic applied in some of the Replies, the Personal Communication Service (“PCS”) would not have constituted a “new” service at its inception because, although it made use of improved digital technologies and made possible new business models and service offerings that had not been possible when analog cellular was the only available mobile technology, the main application offered by PCS providers – mobile voice – had previously been offered for several years.

<sup>70</sup> Verizon Wireless Reply at 5.

congressional delegation on new service and technology policy matters to the Commission's discretion."<sup>71</sup> The precedent marshaled to support this position, however, focuses solely on the first sentence of Section 7(a) (i.e., the sentence stating that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public"),<sup>72</sup> and not on the more substantive requirements upon which M2Z's assertions are based. Section 7's more substantive requirements are clear on their face: they place the burden on those opposing proposals for new services and technologies to show that they should not be authorized, and make clear Congress's expectation that proposals such as the one being considered in this proceeding be resolved within one year of filing. As noted above, the Commission has acknowledged their binding effect on proposals for new technology and services.<sup>73</sup> Moreover, an affiliate of at least one of the Opponents that now dismisses Section 7 as "merely a general statement of policy"<sup>74</sup> has previously characterized Section 7(b) as binding on the Commission.<sup>75</sup>

The fact that Congress did not establish within Section 7 a statutory sanction for the Commission's failure to adhere to the statute's one year deadline does not, as suggested by AT&T,<sup>76</sup> entitle the Commission to ignore the deadline. To the contrary, if the Commission ignores Section 7(b)'s one year deadline, it will be in violation of the Act. Nothing contained in

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<sup>71</sup> AT&T Reply at 22; *see also* CTIA Reply at 12.

<sup>72</sup> *See Allenco Communications, Inc. v. FCC*, 201 F.3d 608, 615, n.2 (5th Cir. 2000)(focusing solely on the first sentence of Section 7(a)); *see also Amendment of Parts 2, 25 and 87 of the Commission's Rules to Implement Decisions from World Radiocommunication Conferences concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range, Amendment of Parts 2 and 25 of the Commission's Rules to Allocate Spectrum for Government and Non-Government Use in the Radionavigation – Satellite Service*, Order on Reconsideration, 21 FCC Rcd 5492, 5500, ¶ 15 (2006) (same).

<sup>73</sup> *See Southwestern Bell MO&O*, ¶ 30.

<sup>74</sup> Verizon Wireless Reply at 5.

<sup>75</sup> *See In the Matter of Petitions for Waiver of Part 69 of the Commission's Rules to Establish Switched Access Rate Elements for SONET-Based Service*, 11 FCC Rcd 21010, ¶ 20 (1996) ("Bell Atlantic also contends that Section 7(b) of the Communications Act requires the Commission to act . . . within one year.").

<sup>76</sup> *See* AT&T Reply at 22, n.95.

the Replies refutes this fact. Moreover, if the one year deadline is exceeded without a grant of M2Z's license request, then other remedies, such as a *writ of mandamus* in case no decision is issued and an APA claim (for violations of law and arbitrary and capricious decisionmaking) if the Application is denied, will be available to enforce the statute.

CTIA asserts that M2Z's interpretation of Section 7 would have the Commission "supersede Section 309(j)'s competitive bidding requirements,"<sup>77</sup> suggesting that there is no way to harmonize M2Z's interpretation of Section 7 with the requirements of Section 309(j). This assertion posits a conflict where none exists. As noted previously herein and in M2Z's other pleadings in this proceeding, Section 309(j)(6)(E) requires the Commission to avoid mutual exclusivity and grant M2Z's license request if doing so would be consistent with the public interest. M2Z has made the required public interest showing in this proceeding, and no party opposing the Application has provided evidence indicating that the service that would ultimately be provided if rights to the 2155-2175 MHz band were auctioned would generate public interest and consumer welfare benefits superior to those generated under M2Z's proposal. Thus, under Section 309(j)(b)(E) the Commission must avoid mutual exclusivity and grant M2Z's license request. There is nothing in Section 7 or Section 309(j) that is inconsistent with the other statute, and no straw man created by CTIA can change the fact that the Commission must grant M2Z's Application by May 5, 2007.<sup>78</sup> Furthermore, Verizon Wireless and CTIA only further

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<sup>77</sup> CTIA Reply at 3.

<sup>78</sup> Moreover, as explained in the Consolidated Opposition and other M2Z submissions in this proceeding, M2Z does not seek a "pioneer's preference" under the Commission program that Congress discontinued, nor does it seek to revive the installment payment plan in return for its requested license. *See* Consolidated Opposition at 69–74. As with so many of the other arguments they recycle in their Replies, the Opponents once again fail to respond to M2Z's pleadings on this point and instead simply repeat the pioneer's preference and installment plan claims made in their Petitions to Deny. *See, e.g.*, CTIA Reply at 3, 8–10; Verizon Wireless Reply at 3. CTIA's dogged insistence that M2Z's Application must be requesting a pioneer's preference but that it cannot be eligible for consideration under Section 7 fails to refute or even engage M2Z's showing on these points in the Consolidated Opposition and elsewhere.

demonstrate that they have failed to examine the record closely when they claim that “[i]n its Opposition, M2Z for the first time asserts that its Application [is subject to] Section 7 of the Act.”<sup>79</sup> As the Commission is well aware, M2Z noted the applicability of Section 7 nearly eight months ago in its Petition for Forbearance which sought a time certain answer on the pending Application.<sup>80</sup>

#### **IV. M2Z HAS SHOWN THAT ITS TDD OPERATIONS WILL NOT CAUSE HARMFUL INTERFERENCE TO IN-BAND AND ADJACENT BAND USERS**

Despite M2Z’s comprehensive treatment of interference issues in its Application and Opposition, two reply comments submitted in this proceeding still maintain that co-channel and adjacent-channel interference could be caused by M2Z’s service.<sup>81</sup> Without addressing M2Z’s technical and interference analysis, Verizon Wireless claims that M2Z has failed to detail the equipment and operating parameters it expects to use for its proposed service, suggesting that such information is needed to gauge the effects M2Z’s operations would have on existing and future co-channel and adjacent channel deployments.<sup>82</sup> In reality, however, M2Z’s Application and Consolidated Opposition provide all of the operating parameters that are generally used to ensure compatibility among co-channel and adjacent channel services.

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<sup>79</sup> Verizon Wireless Reply at 4; *see also id.* at 5 (“M2Z has now christened its Application as one involving new services or technologies under Section 7. . .”). CTIA makes the same error. *See* CTIA Reply at 12.

<sup>80</sup> M2Z Forbearance Petition at iii–iv, 16–17, and 36–38. In the end, Verizon Wireless’s and CTIA’s assertions are both wrong and irrelevant because M2Z qualifies for treatment under Section 7, as explained above.

<sup>81</sup> *See e.g.*, Verizon Wireless Reply at 7 (“Extensive discussion – and the participation of potentially affected parties – is required in order to ensure appropriate interference mitigation techniques are imposed . . . . In particular, as M2Z has failed to detail the equipment and operating parameters it expects to use for its proposed service, co-channel and adjacent channel license holders are unable adequately to estimate the effects that M2Z would have on their existing and future network deployments.”); AT&T Reply at 5 (“[N]othing in M2Z’s Opposition or its consultant’s declaration calls into question the conclusion of the 2006 report by the United Kingdom’s Office of Communications (‘Ofcom’) that adjacent-channel operation of FDD and TDD systems (*i.e.*, without any guard band) is not feasible.”); *id.* at 14 (“The record demonstrates that operation of a TDD system as proposed by M2Z in close proximity to FDD systems may cause harmful interference.”); *see also id.* 16–18.

<sup>82</sup> Verizon Wireless Reply at 7.

The Application, for example, provides the main, booster and base station power limits; the user station power limits and Out-of-Band Emission (“OOBE”) limits that M2Z proposes for NBRS operations.<sup>83</sup> Although this is the information that the Commission typically considers in determining whether a new service can be authorized and licensed in a particular frequency band without causing harmful interference, Verizon Wireless has failed to acknowledge or address the information. In addition, M2Z’s Application and Consolidated Opposition make clear that M2Z will abide by all of the obligations to protect, and where necessary relocate, co-channel operations that have already been imposed on licensees in the AWS bands.<sup>84</sup> In view of these facts, no additional information regarding M2Z’s equipment and operating parameters is needed for the Commission to establish the NBRS as the highest and best use of the 2155-2175 MHz band and grant M2Z’s Application.

AT&T’s reply takes issue with the affidavit of Michael J. Marcus, and defends the analysis AT&T provided regarding a November 2006 Mason Communications Ltd. study that was submitted to the United Kingdom’s Office of Communications (“Ofcom”) addressing Frequency Division Duplex (“FDD”)/TDD compatibility.<sup>85</sup> In particular, AT&T argues that the study demonstrates that a substantial guard band (about 5 MHz) would be needed between

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<sup>83</sup> See Application, Appendix 2, at 3 (“Conditions for Grant of M2Z’s License and Operation of Its Network”).

<sup>84</sup> See *id.* at 3–4; Consolidated Opposition at 88–89. Verizon Wireless incorrectly suggests that grant of the Application without an auction somehow changes the applicability of the clear AWS licensee relocation rules detailed in the Consolidated Opposition. Verizon’s overwrought and unfounded concerns about M2Z’s financial capability to comply with these rules are nothing more or less than frivolous complaints. See Verizon Wireless Reply at 6. No matter M2Z’s financial viability, it would be bound to comply with the relocation rules as an AWS licensee and it has agreed to comply with these commitments as a condition of its license. See Consolidated Opposition at 89.

<sup>85</sup> See Mason Communications Ltd, “2500-2690 MHz, 2010-2025 MHz and 2290-2302 MHz Spectrum Awards – Engineering Study (Phase 2),” at 9 (November 2006) (“Ofcom Report”).

M2Z's TDD operations and the downlink operations of adjacent band FDD licensees to avoid harmful interference from M2Z's TDD operations to the FDD operations in the adjacent bands.<sup>86</sup>

As an initial matter, the study cited by AT&T assumes a band plan that is very different from the band plan at issue in this proceeding. The band plan at issue in the study cited by AT&T had TDD base stations operating in bands immediately adjacent to FDD *uplink* operations,<sup>87</sup> which will not be the case here. Instead, if M2Z's proposal is accepted, TDD operations in the 2155-2175 MHz band will be adjacent to FDD *downlink* operations in both the lower and upper adjacent bands. This distinction is a relevant one. As the Marcus Affidavit makes clear, M2Z's TDD operations will be too far away spectrally from FDD uplink operations (located in the 1710-1755 MHz band) to cause the type of interference to FDD base station operations that was the primary focus of concern in the study.<sup>88</sup> The study cited by AT&T highlights a specific set of counter-measures that FDD and TDD operators might take to prevent harmful interference in view of the specific band plan at issue. For this set of counter-measures, the study advises that a guard band must be used between FDD and TDD systems.<sup>89</sup> In the case of the 2155-2175 MHz band, however, interference to FDD base station operations is of little concern because of the spectral distance between the 2155-2175 MHz band and FDD uplink operations. Moreover, although the presence of adjacent AWS band FDD downlink operations requires M2Z to mitigate the risk that its TDD operations might cause harmful interference to the mobile operations of its FDD neighbors, M2Z has a wide range of mitigation tools at its disposal

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<sup>86</sup> AT&T Reply at 16–17.

<sup>87</sup> See Ofcom Report at 9, Table 1.1; see also Consolidated Opposition, Affidavit of Michael J. Marcus, at 3 (“Marcus Affidavit”).

<sup>88</sup> See Marcus Affidavit at 3.

<sup>89</sup> Ofcom Report at 6.

to prevent such harmful interference from occurring.<sup>90</sup> Nothing in AT&T's filings suggests otherwise.

In its reply comments, AT&T also criticizes M2Z's use of probabilistic analysis (based on factors such as usage time and user proximity) to quantify the low potential for mobile-to-mobile interference if no mitigation techniques are used, stating that "this probabilistic approach merely estimates how often harmful interference will be encountered, while accepting that it will occur with certainty."<sup>91</sup> AT&T thus appears to take issue with the Ofcom Report's finding that "[t]he probability of the predicted worst-case scenario interference occurring is low."<sup>92</sup> Perhaps AT&T thinks that only the deployment of new TDD systems can impact previously deployed systems? The reality, however, is that ever since Marconi built his second transmitter, every new radio transmitter has impacted previously deployed systems. FDD systems do not exist in a vacuum or provide perfect service coverage throughout their service areas. The entry of new FDD systems will also impact existing FDD systems. M2Z will design its network with appropriate real time countermeasures that the "Ofcom study" never considered to ensure that its impact on neighboring FDD systems is comparable to customary impacts from adjacent channel FDD systems. That is why licensee-to-licensee coordination is used to reduce these impacts to an acceptable level. As noted previously in this docket, M2Z believes that this same approach can be used in the 2155-2175 MHz band to minimize the impact of its NBRS on adjacent band FDD licensees.

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<sup>90</sup> See Consolidated Opposition at 98; Marcus Affidavit at 4–5.

<sup>91</sup> AT&T Reply at 17.

<sup>92</sup> Ofcom Report at 7; *see also* AT&T Reply at 17.

In its reply comments, AT&T, citing Ofcom Report language suggesting a 1 km separation distance between FDD and TDD base stations to avoid interference from FDD base stations to TDD base stations, also states:

M2Z does not indicate that it is willing to accept interference from FDD, or that it is willing to accept conditions restricting its base stations' locations to avoid such interference. AWS operators using the adjacent spectrum should not, however, be required to reconfigure their FDD operations to prevent interfering with M2Z's operations using an incompatible TDD technology.<sup>93</sup>

So that the record is clear on this issue, M2Z is not asking the Commission to require adjacent band FDD licensees to locate their base stations at a distance of at least 1 km from M2Z base stations. M2Z is not, in fact, requesting that the Commission establish any separation distance between FDD and M2Z base stations. Instead, M2Z is confident that, in the absence of Commission rules, M2Z will have a wide variety of tools at its disposal to ensure that its base station operations are not harmed by adjacent band base station operations.

M2Z's technical filings in this proceeding demonstrate that its TDD network can be deployed widely without causing harmful interference to, or receiving harmful interference from, adjacent band and co-channel licensees. Therefore, no additional information is required before the Commission can grant the Application.

## **V. NO SUBSTANTIAL AND MATERIAL QUESTIONS OF FACT EXIST THAT PREVENT COMMISSION GRANT OF M2Z'S LICENSE REQUEST**

As explained in the Consolidated Opposition, Section 309(d) of the Act requires petitions to deny to set forth "specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent" with the public interest, and "must present a 'substantial and material question of fact.'"<sup>94</sup> Despite M2Z's unrefuted public interest

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<sup>93</sup> AT&T Reply at 18.

<sup>94</sup> See Consolidated Opposition at 111–114 (quoting *Application of GTE and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer*

demonstration, the Replies persist in claiming that there are substantial and material questions of fact that would prevent the Commission from granting the Application on the basis of the public interest showing made in M2Z's prior submissions in this docket.<sup>95</sup> The Opponents' allegations do not raise such questions, and serve merely as generic and conclusory assertions of public interest harm that fail to meet the statutory standard for petitions to deny.<sup>96</sup> Therefore, even if the Replies had attempted to counter M2Z's public interest showing – which they do not – the Opponents' "legal and economic conclusions concerning market structure, competitive effect, and the public interest . . . manifestly do not" rise to the level of substantial and material questions of fact.<sup>97</sup> M2Z fully addressed the Opponents concerns in the Application, the Consolidated Opposition, the Motions, and other submissions in both dockets in this proceeding, but for the sake of clarity once again addresses all of the topics raised by AT&T, Verizon Wireless, and others Opponents in the Replies.

*Adjacent Band Interference:* AT&T and Verizon Wireless question M2Z's ability to mitigate harmful adjacent channel interference in the 2155-2175 MHz band.<sup>98</sup> As explained in Part III above, M2Z has provided an abundant amount of technical detail regarding its adjacent interference avoidance proposal in its Application and subsequent submissions.<sup>99</sup> Moreover,

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*Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 434 (2000) ("GTE Order").

<sup>95</sup> See, e.g., AT&T Reply at 11 ("[T]he application [ ] cannot be granted because there remain substantial and material questions of fact and insufficient information for the Commission to make a public interest finding."); see also Verizon Wireless Reply at 6–7 (asserting that "substantial questions" have been raised regarding M2Z's ability to protect against harmful co-channel and adjacent interference).

<sup>96</sup> See 47 U.S.C. § 309(d)(1).

<sup>97</sup> *GTE Order*, ¶ 436 (quoting *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1496–97 (D.C. Cir. 1995)).

<sup>98</sup> Specifically, AT&T and Verizon raised concerns regarding the level of detail provided for M2Z's interference avoidance proposal. See AT&T Reply at 14 ("M2Z only offers generalizations about working to avoid interference; no specific technical demonstrations showing how its proposed system will actually work let alone mitigate and avoid harmful interference are provided."); Verizon Wireless Reply at 7 ("[S]ubstantial questions have also been raised as to how adjacent and co-channel licensees will be protected from interference by M2Z's operations.").

<sup>99</sup> See Application, Appendix 2, at 3–4 ; Consolidated Opposition at 87–98.

M2Z provided an engineering affidavit in its Opposition stating the interference avoidance measures proposed.<sup>100</sup> M2Z has indicated that once AWS-1 networks are deployed, even more precise technical testing and coordination can be employed to ensure that no harmful interference results.<sup>101</sup> M2Z is committed to its role as a responsible spectral neighbor.

*Financial Viability:* AT&T and Verizon Wireless question whether M2Z has adequate financial backing to complete a nationwide network.<sup>102</sup> M2Z has publicly indicated that its financial resources are far greater than \$400 million and submitted a confidential showing to the Commission regarding its financing capacity to construct the network buildout.<sup>103</sup> M2Z also set forth in its Opposition that its existing backers, including Kleiner Perkins Caufield & Byers, Charles River Ventures, and Redpoint Ventures are undoubtedly capable of seeing the network buildout through to completion, as these firms have generated over \$200 billion in value to shareholders and \$40 billion in annual revenues.<sup>104</sup> Even using Verizon Wireless's distorted network cost estimates of \$18 billion,<sup>105</sup> such a figure could be amortized over a period of years and M2Z has the necessary financial resources available to construct its network.

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<sup>100</sup> Marcus Affidavit, ¶ 19 (“The basic interference mitigation technologies to be employed in M2Z’s proposed network are: (1) automatic transmitter power control, (2) smart antennas, and (3) careful base station selection of channels and time slots for subscriber units.”).

<sup>101</sup> M2Z even recognized the need for greater AWS-1 information in the context of determining the interference rate. *See id.*, ¶ 13 (“A precise quantification of [the interference] rate requires modeling of the specific systems that adjacent block licensees intend to use.”).

<sup>102</sup> *See* AT&T Reply at 11; *see also* Verizon Wireless Reply at 8–9.

<sup>103</sup> Consolidated Opposition at 113 n.365; *see also* Request for Confidential Treatment of M2Z Networks, Inc., WT Docket Nos. 07-16 and 07-30 (filed Mar. 26, 2007).

<sup>104</sup> Consolidated Opposition at 113 n.365.

<sup>105</sup> Verizon Wireless Reply at 9. Verizon Wireless suggests that M2Z estimated the construction costs for its NBRS network as \$18 billion, then chides M2Z for picking a figure that “likely grossly underestimates the costs of building such a system.” *See* Verizon Wireless Petition to Deny at 13 n.47. The figure that Verizon Wireless cites was described clearly by M2Z’s Application as the cost that “[v]arious public safety organizations have estimated [for] . . . building out [ ] a nationwide, interoperable network” that would be “capable of providing broadband services to first responders.” Application at 24. Verizon Wireless distorts the statement in the Application, grossly mischaracterizing as M2Z’s own estimate for construction the NBRS a dollar amount that M2Z reported as a third-party estimate for an interoperable public safety network. M2Z is in no position to assess whether this is yet another

For these reasons and others, the Commission also should give no weight to the hodgepodge of claims raised in certain Replies suggesting that M2Z seeks subsidized or free spectrum because it does not have the financial wherewithal to obtain the spectrum otherwise.<sup>106</sup> As explained in M2Z’s prior filings and again herein, M2Z’s proposal will provide for recovery of a portion of the value of public spectrum resource that will be used to provide the NBRs, in the form of M2Z’s voluntary payments to the U.S. Treasury and the public interest and consumer welfare benefits that would flow from M2Z’s service.<sup>107</sup>

*Service Viability:* AT&T and Verizon Wireless question whether M2Z has provided sufficient information for the Commission to determine whether M2Z’s proposed service is a viable business model.<sup>108</sup> The Replies ignore the economic analyses in the record conservatively estimating that M2Z will pay spectrum usage fees based on its revenue from premium services of “more than \$35 million to more than \$536 million from 2008 onwards[.]”<sup>109</sup>

*Alternative Potential Uses:* Some Opponents argue that M2Z has not demonstrated that the proposed NBRs system is the highest and best use of 2155-2175 MHz when compared to the

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example of Verizon Wireless simply misreading M2Z’s pleadings or intentionally misstating M2Z’s positions. In its reply, Verizon Wireless then engages in the additional distortion of pretending to know what construction of the NBRs network would cost while simultaneously complaining that “M2Z has failed to detail the equipment and operating parameters it expects to use for its proposed service,” rendering Verizon Wireless unable to gauge the type of service that M2Z would provide or the effects that M2Z’s service would have on spectrally adjacent networks and yet somehow certain that M2Z has “grossly underestimate[d]” the cost of deploying such service. *See* Verizon Wireless Reply at 7; Verizon Wireless Petition to Deny at 13 n.47.

<sup>106</sup> *See, e.g.,* MetroPCS Reply at 3–6; AT&T Reply at 12; CTIA Reply at 3.

<sup>107</sup> *See* Consolidated Opposition at 44–45.

<sup>108</sup> AT&T Reply at 11 (“M2Z has provided no economic support for its business model to demonstrate that an advertiser-based free basic broadband service is economically viable.”); Verizon Wireless Reply at 9 (“M2Z has also failed to provide sufficient detail about its proposal for the FCC to ensure that its business plan is economically feasible.”).

<sup>109</sup> Wilkie, “Consumer Welfare Impact,” at 20 (indicating that where M2Z’s spectrum usage fee payments will fall in that range will depend upon whether it acquires one million to fifteen million premium service customers).

alternative proposals.<sup>110</sup> These Opponents fail to note that the Commission has not accepted for filing any competing applications for the 2155-2175 MHz band, as M2Z's Application is the only proposal that has been accepted for filing.<sup>111</sup> Furthermore, M2Z's Application is clearly superior in terms of its public interest and consumer welfare benefits when compared to the other proposals. As stated in the Motion to Dismiss and as reiterated in Part I above, the alternative proposals lack key public interest commitments that M2Z has proposed to provide as a condition of its license, such as free broadband service available nationwide; a specific and firm buildout obligation; USF savings and enhancements; family-friendly Internet filtering technology; public safety usage commitments; Part 27 interference protection standards; and over \$400 million in existing financial commitments, among other benefits.<sup>112</sup> The parties submitting alternative proposals have generally suggested that their proposals not be reviewed on a comparative basis with M2Z's Application,<sup>113</sup> and such unwillingness to be compared to M2Z is motivated at least in part by the fact that there is no comparison between the public interest benefits proposed in the Application and those proposed in the meager, copy-cat submissions. The Commission should, nevertheless, make the common-sense decision to use M2Z's proposal as a benchmark against which the alternative proposals should be judged. Opponents such NextWave ask the Commission to turn a blind eye to the fact that they have made inferior proposals for use of the 2155-2175 MHz band, and hope that just submitting some kind of proposal will be good enough to create the illusion of mutual exclusivity. The Commission should exercise its discretion to promote and protect the public interest by granting M2Z's Application.

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<sup>110</sup> See AT&T Reply at 14; Reply of NetFreeUS, LLC to Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny, WT Docket Nos. 07-16 and 07-30 at 8 (filed Apr. 3, 2007); MetroPCS Reply at 8; NextWave Reply at 5.

<sup>111</sup> See Motion to Dismiss at 72–78.

<sup>112</sup> See *id.* at 19–49.

<sup>113</sup> NextWave Reply at 8.

*Tower Site Assurances:* AT&T for the first time raises questions regarding tower site assurances for the network that M2Z would construct.<sup>114</sup> However, several independent tower companies have nationwide tower footprints and at least two, American Tower<sup>115</sup> and Crown Castle,<sup>116</sup> have tower portfolios large enough to support a nationwide network deployment. Between national tower providers and the many independent tower site locations, there are hundreds of thousands of potential towers for M2Z's proposed sites. Upon grant of the Application, M2Z could assemble quickly the tower leases required to construct its network.

*Proposed Rural Service Benefits:* Contrary to the claims of AT&T, no question exists regarding the benefit of M2Z's proposed rural service.<sup>117</sup> After grant of the Application, M2Z would provide free service where broadband does not otherwise exist, and in the process would provide real benefits to consumers currently without adequate broadband availability and those who currently pay too much for service.<sup>118</sup> AT&T recycles its arguments from its petition to deny by claiming that M2Z's proposal to provide free broadband service could discourage the provision of advanced services by other, hypothetical providers.<sup>119</sup> As M2Z explained in the Consolidated Opposition, consumers in areas that are currently without broadband service do not have the luxury of waiting until the existing broadband providers decide that it would be economically advantageous to deploy in such areas.<sup>120</sup> Moreover, the fact that an entrenched

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<sup>114</sup> AT&T Reply at 12.

<sup>115</sup> See American Tower Website available at <http://www.americantower.com/atcweb> (for further leasing information).

<sup>116</sup> See Crown Castle International Website available at <http://www.crowncastle.com/> (for further leasing information).

<sup>117</sup> AT&T Reply at 12.

<sup>118</sup> See Application at 26–28; *id.*, Appendix 2, at 2; *see also* Consolidated Opposition at 15–16 (discussing consumer welfare benefits in the range of \$18 to \$32 billion to be provided by M2Z's proposed service).

<sup>119</sup> AT&T Reply at 12.

<sup>120</sup> See Consolidated Opposition at 18–19.

incumbent like AT&T is not currently serving certain rural areas demonstrates a business decision to ignore such consumers that was made long before M2Z filed its Application. As M2Z also noted in that pleading, grant of licenses without auction to commercial providers is an extremely common occurrence.<sup>121</sup> Furthermore, grant of the Application without auction would be no more “anti-competitive and injurious”<sup>122</sup> to commercial broadband providers than was grant of the initial, valuable CMRS licenses without auction to several of the Opponents and their predecessors in interest.<sup>123</sup>

*Service Speed:* Opponents have criticized M2Z’s free broadband service for proposing service rates of at least 384 kbps downstream and 128 kbps upstream throughout the United States.<sup>124</sup> The Commission uses the term “broadband” to refer to services that provide transmission rates more than 200 kbps in at least one direction.<sup>125</sup> NBRS exceeds that definition. While ignoring the standard for measuring what constitutes broadband capability, M2Z’s opponents seek to speak for consumers. However, their self-interested reservations are not expressed in the record when hundreds of consumers *speak for themselves*.<sup>126</sup> Indeed, the criticism on speed ignores the fact that over one hundred million American adults lack access to broadband. For those who have no broadband connection at all, M2Z’s proposed asymmetric rate is considerably faster than a 56K modem. Moreover, M2Z will provide a premium service

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<sup>121</sup> See Consolidated Opposition at 60.

<sup>122</sup> See NextWave Reply at 7–8.

<sup>123</sup> See Consolidated Opposition at 63, 74 n.238.

<sup>124</sup> CTIA Reply at 18 (contending that many commercial wireless data rates greatly exceeded M2Z’s proposed rate for the NBRS); AT&T Reply at 12 (arguing that M2Z is under no obligation to upgrade the basic technology speeds as technology and services warrant); Verizon Wireless Reply at 4 (stating that numerous entities currently provide wireless broadband services at faster speeds than M2Z proposes).

<sup>125</sup> See *Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd. 22340, at ¶ 3 n.7 (2004).

<sup>126</sup> See, e.g. Comments of Ricardo Colon, WT Docket Nos. 07-16 and 07-30 (“That is why I am so excited about the M2Z proposal to establish a nationwide wireless and portable broadband network for free. It doesn’t get any better than that.”).

at a considerable discount from most broadband wireless services. As a result, even at the minimum data rate that M2Z will provide as a condition of its license, consumers will receive substantial benefits and have attractive new choices for broadband service based on price and performance. As M2Z has noted on several occasions, the Application establishes these data rates as minimum guarantees and enforceable promises regarding the level of service that M2Z would provide via the NBRS, but all of the specifics of the service that M2Z would deploy are subject to the Commission's regulatory authority, technological advances, and marketplace developments.<sup>127</sup> As a result, M2Z's service can and will be scalable and adaptable over time. Moreover, as the voluminous record in this proceeding demonstrates, consumers, consumer groups, and consumer advocates have clamored for M2Z's proposed broadband service and urged the Commission to grant the Application.<sup>128</sup>

*Valuation of the Proposed Spectrum:* Contrary to the arguments put forth by AT&T,<sup>129</sup> no expert valuation of the proposed license in the 2155-2175 MHz band is required in order for the Commission to grant the Application.<sup>130</sup> As M2Z stated in its Consolidated Opposition,<sup>131</sup> Section 309(j)(7)(A) of the Act flatly prohibits the Commission from making a spectrum use

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<sup>127</sup> See Consolidated Opposition at 99–100.

<sup>128</sup> See, e.g., Comments of the National Association of State Utility Consumer Advocates, WT Docket Nos. 07-16 and 07-30, at 4 (submitted Mar. 19, 2007) (“NASUCA Comments”) (“NASUCA agrees with M2Z that access to a high-speed data network would prove valuable to many Americans in addition to being a vast improvement for those that have access to only dial-up service today.”); Comments of Walter Dartland, Director, Consumer Federation of the Southeast, WT Docket No. 07-16 (submitted Apr. 3, 2007). In addition to these supportive comments and several others filed by similar organizations, the record in this proceeding is filled with dozens if not hundreds of comments from consumers and small businesses citing the need for an affordable broadband option such as M2Z's NBRS.

<sup>129</sup> See AT&T Reply at 13.

<sup>130</sup> See, e.g., NASUCA Comments at 13 (noting that “AT&T also cites no authority for a specific requirement that the fee must be based on a valuation of the spectrum”).

<sup>131</sup> Consolidated Opposition at 65.

decision based on the potential for auction revenues.<sup>132</sup> Moreover, even if the Commission were to take spectrum valuation decisions into account, which it should not, M2Z's economic analysis has shown that the consumer welfare impact of NBRs greatly exceeds even the most optimistic expected value of the spectrum.<sup>133</sup> AT&T ties its argument that an expert valuation is necessary before grant of the Application to its unfounded windfall arguments, discussed more fully below; but to the extent that AT&T implies that a spectrum valuation is necessary prior to the Commission's decision whether to auction the 2155-2175 MHz spectrum, this contention appears to be a back-door attempt to suggest, in violation of Section 309(j)(7)(A), that the Commission should auction the spectrum if it is particularly valuable.<sup>134</sup>

*Spectrum Usage Fee:* Contrary to AT&T's claims,<sup>135</sup> no question exists as to the spectrum usage fee's legality. M2Z has affirmatively demonstrated that its proposed payment to the U.S. Treasury would not violate the Miscellaneous Receipts Act ("MRA") and the Anti-Deficiency Act ("ADA").<sup>136</sup> AT&T's claim that the Commission's acceptance of spectrum usage fee payments without a specific spectrum valuation would constitute an illegal and

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<sup>132</sup> See 47 U.S.C. §309(j)(7)(A) ("In making a decision . . . to assign a band of frequencies to a use for which licenses or permits will be issued . . . the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding . . .").

<sup>133</sup> Compare Wilkie, "Consumer Welfare Impact," at 20–22 (concluding that the net present value of M2Z's proposed NBRs network could conservatively range from more than \$18 billion to more than \$25 billion); with AT&T Reply at 13 n. 47 (stating that "NextWave indicates that the value of comparable spectrum covering the United States sold for \$4.1 billion in the recent AWS Auction for F Block spectrum immediately adjacent to 2155-2175 MHz" and implying that an auction of the unpaired spectrum at 2155-2175 MHz could potentially command a similar price at auction). As M2Z demonstrated in the Consolidated Opposition, precedent from previous Commission auctions for nationwide licenses consisting of unpaired spectrum suggest a value far lower than AT&T's overly optimistic estimates for the value of this block at auction. See Consolidated Opposition at 69.

<sup>134</sup> See Consolidated Opposition at 105.

<sup>135</sup> AT&T Reply at 13.

<sup>136</sup> See Consolidated Opposition at 103–111. Both of these erroneous statutory arguments have been considered and rejected by the Commission in other contexts, and also by the Government Accountability Office ("GAO"). See "Whether the Federal Communications Commission's Order on Improving Public Safety Communications in the 800 MHz Band Violates the Antideficiency Act or the Miscellaneous Receipts Statute," No. B-303413 (Nov. 8, 2004).

unenforceable tax is likewise without merit.<sup>137</sup> Additionally, CTIA contends that the five percent voluntary usage fee to be paid under M2Z’s proposal would make the Commission an “equity investor” in M2Z’s business and these payments would cause the FCC to have a obvious conflict of interest.<sup>138</sup> The logic advanced by CTIA is terribly misguided, as it would make the Commission an equity investor in every private company from which the United States collects a revenues-based USF contribution; every commercial and noncommercial broadcaster from which the Commission collects a five percent fee on revenues derived from ancillary services; and every company from which the Commission collects a revenues-based regulatory fee, such as the cable operators from whom the Commission collects a regulatory fee based on the number of subscribers that each cable system serves.<sup>139</sup>

*Public Safety Benefits:* Opponents also question whether M2Z’s proposed public safety benefits are legitimate.<sup>140</sup> M2Z has detailed the public interest benefits of its proposal in the Application and the Consolidated Opposition, as well as in numerous other submissions.<sup>141</sup> Under the M2Z proposal, any federal, state, county or municipal public safety organization willing to utilize the NBRS network would be able to do so for free without any limits as to the number of devices it may attach to the network. Even after accounting for the initial NBRS

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<sup>137</sup> See AT&T Reply at 18. AT&T cites the argument in its petition to deny, but that argument’s reliance on the cases that AT&T cited is misplaced. AT&T argues that the Commission has no authority to levy such a “tax.” See AT&T Petition to Deny at 24–25. M2Z has explained repeatedly that its payment of the spectrum usage fee would be a voluntary commitment and condition of its license – not a tax or fee that the Commission imposes – and that fee would be paid directly to the U.S. Treasury, not the Commission. See, e.g., Consolidated Opposition at 104–105.

<sup>138</sup> CTIA Reply at 10 (“M2Z also fails to rebut that the five percent installments that M2Z proposes to pay effectively make the FCC an ‘equity investor’ in M2Z’s venture – in exchange for the contribution of an asset to the business, the FCC will derive an equity return.”). M2Z did rebut this claim, as it discussed the illogic of CTIA’s far-fetched contention in the Consolidated Opposition at page 110, note 355.

<sup>139</sup> See Consolidated Opposition at 110, n.355.

<sup>140</sup> See e.g., AT&T Reply at 13; MetroPCS Reply at 10–11.

<sup>141</sup> See Application at 26–28; Consolidated Opposition at 16–18.

equipment costs, M2Z has documented that its public safety usage proposal could save public safety entities billions of dollars.<sup>142</sup>

*Windfall to M2Z:* Some Opponents claim that a grant of this Application would result in a windfall to M2Z.<sup>143</sup> This is not the case, as grant of the Application would create far more value to the American public than M2Z would receive from the Commission by grant of a spectrum license. The many public interest benefits that M2Z has demonstrated will flow from its service also demonstrate that no there will be no windfall as a result. M2Z has provided in detail its USF subsidy savings, public safety savings, consumer welfare benefits and spectrum usage fee payments,<sup>144</sup> all of which will combine to more than adequately recover a portion of the value of the public spectrum resource<sup>145</sup> that would be used to provide the NBRS.

## **VI. NO ADDITIONAL PROCEEDING TO DEVELOP SERVICE RULES IS NECESSARY**

The Opponents have also failed, once again, to demonstrate that additional proceedings to establish service rules for the NBRS are required by law or appropriate under Commission precedent. In its Consolidated Opposition, M2Z demonstrated that the Commission has all of the information it needs to grant M2Z a license for the 2155-2175 MHz band.<sup>146</sup> Rather than provide specific modifications or other suggested changes to the service rules contained in M2Z's Application, the Replies simply parrot the argument that the Commission is required to conduct a separate rulemaking to establish service rules for the band.<sup>147</sup> The Commission does

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<sup>142</sup> See Consolidated Opposition at 16–17 (stating that public safety organizations estimate costs for the construction of an interoperable network to be as high as \$18 billion, whereas every public safety official in the country could utilize M2Z's NBRS service for an estimated \$625 million.).

<sup>143</sup> See e.g., MetroPCS Reply at 2.

<sup>144</sup> See, e.g., Application at 26–28.

<sup>145</sup> See 47 U.S.C. § 309(j)(3)(C).

<sup>146</sup> See, e.g., Consolidated Opposition at 75–99.

<sup>147</sup> See, e.g., CTIA Reply at 11–12, AT&T Reply at 7–8, MetroPCS Reply at 9.

not need to delay service in the band further by initiating a separate rulemaking proceeding, and the Opponents' requests on this point should be denied.

First, it bears repeating (if only for the benefit of the Opponents) that M2Z itself provided a complete array of licensing and service rules in its Application. The Application contains a proposed band plan, with a 20 MHz license size and a nationwide geographic area; service rules, with specific build-out, service type, power limit, and interference/coordination/band transition rules; and specific conditions that would be applicable to the licensee, including requirements that the licensee provide free family-friendly broadband service and make annual payments to the treasury. In short, the Application covers all of the *exact same issues* generally discussed in a service rules proceeding. Thus, to the extent that the Opponents argue that the Commission must “lay the ground rules for operation”<sup>148</sup> in the 2155-2175 MHz band, M2Z’s Application provides those ground rules (and does so within the current AWS allocation framework). Numerous parties have commented on these aspects of M2Z’s proposal, and if the Opponents had any valid concerns regarding the proposed service rules, they have had ample opportunity to raise those concerns in this proceeding.

The Commission may license the 2155-2175 MHz band through the current, open adjudicative proceeding rather than through a rulemaking. As M2Z noted in its Consolidated Opposition, the Commission itself has confirmed that a rulemaking is not required before a license may be assigned.<sup>149</sup> The *Northpoint Order* states that “[t]he Commission has broad discretion in deciding to proceed by rulemaking or adjudication.”<sup>150</sup> The Replies fail to explain why that discretion does not apply in the current context, where a single nationwide license

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<sup>148</sup> See CTIA Reply at 11.

<sup>149</sup> See Consolidated Opposition at 78–80.

<sup>150</sup> *Northpoint Order*, ¶ 218; see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291–95 (1974); *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

would be granted in a lightly used band and all of the outstanding service rules and technical issues have been addressed.<sup>151</sup> A service rules proceeding, at this juncture, is simply unnecessary in the context of M2Z's Application.

Finally, to the extent some of the Opponents remain convinced that the Commission must treat this proceeding as a dress rehearsal and establish a separate rulemaking proceeding to satisfy APA requirements,<sup>152</sup> they are wrong. The Commission may grant M2Z's Application without opening a formal rulemaking, consistent with the APA and the concept of fundamental fairness that governs the Commission's administrative processes. The APA requires that the Commission provide interested parties with notice and a reasonable opportunity to comment on the Application.<sup>153</sup> The Bureau's placement of the Application on Public Notice,<sup>154</sup> and the full record developed in response to that Public Notice, meets this requirement.<sup>155</sup> A grant of M2Z's Application that adopts M2Z's proposed service rules is a "logical outgrowth" of the underlying proposal, something that interested parties "should have anticipated" and addressed in their pleadings.<sup>156</sup> To reward the Opponents for forgoing detailed consideration of M2Z's proposed service rules in all of their filings in this proceeding would amount to allowing the Opponents to

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<sup>151</sup> See *Northpoint Order*, ¶ 3 (proceeding by rulemaking in part because of complex spectrum sharing issues between the applicant and incumbent users).

<sup>152</sup> See, e.g., CTIA Reply at 11–12, AT&T Reply at 10–11, Verizon Wireless Reply at 8.

<sup>153</sup> See, e.g., *Nat'l Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1174 (D.C. Cir. 1996); *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir.1995). In these and other cases ruling on the propriety of agency action under the APA's notice and comment rulemaking provisions, courts note that the requirements of notice and an opportunity to comment are designed only to facilitate public participation and fairness in agency decisionmaking and to assure interested parties that the agency will have before it the facts and information necessary to render a decision. See *MCI Telecommunications Corp.*, 57 F.3d at 1141. Those goals have been met in this proceeding.

<sup>154</sup> See Public Notice, *supra* note 1.

<sup>155</sup> In addition, the Public Notice also provides notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved" by soliciting comment on M2Z's Application, which itself included proposed service rules. See 5 U.S.C. § 553(b)(3).

<sup>156</sup> See *International Union, United Mine Workers of America v. Mine Safety and Health Admin*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (stating that a final rule is a "logical outgrowth" of a proposed rule when "interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period") (internal citations omitted).

abuse the FCC's processes. Further, the APA does not require duplicative proceedings, and any additional proceeding would be a waste of time, as the Opponents have provided no specific examples of issues that can not be addressed and resolved in this licensing proceeding based on the robust record developed.

**VII. THE OPPONENTS ADDITIONAL ARGUMENTS IN THE REPLIES REGARDING M2Z'S PETITION FOR FORBEARANCE DO NOT CHANGE THE CONCLUSION THAT M2Z'S PETITION SHOULD BE GRANTED**

Many of the Opponents include in their Replies comments on, or brief references to, M2Z's Petition for Forbearance.<sup>157</sup> None of the Opponents' arguments regarding forbearance in the Replies are new, as each of them have been raised previously in comments and oppositions filed by the Opponents against the Petition for Forbearance. M2Z adequately answered these arguments in its Forbearance Reply Comments<sup>158</sup> filed in this proceeding, pursuant to the directives of the Forbearance Public Notice.<sup>159</sup> For example, M2Z already has refuted AT&T's tortured analysis of the request made in the Petition for Forbearance and the Commission's standards for granting such requests. AT&T suggests again in its reply that grant of the Petition for Forbearance would actually deprive the Commission of authority under the rules to grant the M2Z Application.<sup>160</sup> As M2Z has explained in its prior filings, the Petition for Forbearance does not seek forbearance from Section 309 of the Act or Section 1.945(c) of the rules in their entirety, as AT&T intimates, but rather requests forbearance only from those provisions of these statutes and rules that might impede grant of the Application.<sup>161</sup> The remaining, operative

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<sup>157</sup> See e.g., AT&T Reply at 19–21; CTIA Reply at 2; MetroPCS Reply at 11–14; T-Mobile Reply at 5.

<sup>158</sup> See Reply Comments of M2Z Networks, Inc., WT Docket Nos. 07-16 and 07-30 (filed Apr. 3, 2007) (“Forbearance Reply Comments”).

<sup>159</sup> See Forbearance Public Notice, *supra* note 1.

<sup>160</sup> See AT&T Reply at 20.

<sup>161</sup> See Forbearance Reply Comments at 12.


language of the rule that does not impede the grant of M2Z's Application is not covered by the request made in the Petition for Forbearance. M2Z refuted each of the failed claims regarding the Petition for Forbearance that Opponents attempt to inject into this latest round of pleadings, answering the Opponents' meritless arguments in its earlier submissions in this proceeding.

### **CONCLUSION**

As the foregoing discussion makes clear, the latest pleadings filed from M2Z's Opponents break no new ground and raise no new arguments that would prevent the Commission from swiftly granting M2Z's Application. The longer the Commission delays in issuing a decision to grant the Application – and the longer the Commission allows entrenched incumbents and spectrum speculators to delay such a decision – the longer consumers must wait for a broadband wireless service that will truly compete against current broadband offerings by expanding coverage and offering free service in unserved and under-served areas. For these reasons, the Commission should act quickly to grant the Application.

Respectfully submitted,

**M2Z NETWORKS, INC.**

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
M2Z NETWORKS, INC.	)	
	)	
Application for License and Authority to	)	WT Docket No. 07-16
Provide National Broadband Radio Service	)	
In the 2155-2175 MHz Band	)	
	)	
Petition for Forbearance Under	)	WT Docket No. 07-30
47 U.S.C. § 160(c) Concerning Application of	)	
Sections 1.945(b) and (c)	)	
Of the Commission's Rules and Other	)	
Regulatory and Statutory Provisions	)	

To: Chief, Wireless Telecommunications Bureau

**AFFIDAVIT OF UZOMA C. ONYEIJE IN SUPPORT OF *EX PARTE* RESPONSE OF  
M2Z NETWORKS, INC. TO REPLIES AND OPPOSITIONS**

I, Uzoma C. Onyeije, do hereby declare under penalty of perjury the following:

1. I am Vice President for Regulatory Affairs of M2Z Networks, Inc. ("M2Z").
2. I have read the foregoing *Ex Parte* Response of M2Z Networks, Inc. to Replies and Oppositions, and any facts stated therein, of which the Federal Communications Commission may not take official notice, are true and correct to the best of my knowledge, information, and belief.

Signature: \_\_\_\_\_

  
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Date: \_\_\_\_\_



Subscribed and sworn to before me this 16th day of April 2007.

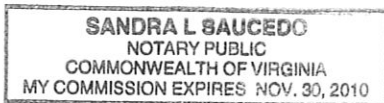
Notary Public:

My Commission expires:

Residing at:

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## **CERTIFICATE OF SERVICE**

I, Christopher G. Tygh, an attorney in the law office of Sheppard Mullin Richter & Hampton, LLP, hereby certify that I have on this 16th day of April 2007 caused a copy of M2Z Networks, Inc.'s *Ex Parte* Response to Replies and Oppositions to be delivered by first-class mail to the following:

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Christopher G. Tygh